

**STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD**

**IN THE MATTER OF THE PROPOSED
REPEAL OF REGULATIONS,
20.2.100 NMAC – Greenhouse Gas Reduction Program**

No. EIB 11-16 (R)



**ORDER ON MOTIONS
TO ADMIT PRIOR SWORN TESTIMONY AND TO TAKE ADMINISTRATIVE
NOTICE OF RECORD IN EIB RULEMAKINGS AND COURT FILES**

On November 8, 2011, New Energy Economy (NEE) filed a Motion to Admit Prior Sworn Testimony and a Motion to Take Administrative Notice of Record in EIB Rulemakings and Court Files. Petitioners filed Responses to both motions on November 23, noting they did not object to the admission of the prior sworn testimony for certain limited purposes, but did object to its being considered technical testimony in this proceeding. NEE filed a Reply in Support of the Motion to Admit Prior Sworn Testimony on November 29.

The Motions are granted, except for the documents from the appellate courts, for the reasons stated therein and for the following reasons:

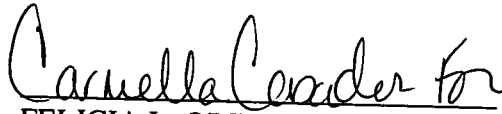
- a. In their Response, Petitioners have accurately set out the procedural background on the question of how much of the hearing record in EIB 08-19 would be made part of the record in this matter. I can add only that throughout the history set out in August, September and October 2011, the Hearing Officer was honoring the Board members' feelings as she understood them, and in particular their concern that consideration of the entire record in EIB 08-19 would lead to confusion.

- b. On November 15, during the last day of hearing in EIB 11-15/11-17, the Board members stated they now desired to consider the whole record in EIB 10-04 and 10-09 as part of the record in EIB 11-15/11-17, and the whole record in EIB 08-19 as part of the record in EIB 11-16. (Volume 3 of the transcript, pages 535-539) The Chair noted specifically the Board’s discretion to look at all the evidence and give it the proper weight in its decision-making. (Tr. p. 537)
- c. The Hearing Officer, who had planned to accept the disputed parts of the prior records merely as part of an offer of proof, instead stated that the Board would “take administrative notice” of the entire record in the earlier proceedings. (Tr. p. 538)
- d. Petitioners note accurately that the Air Quality Control Act and the Board’s Rulemaking Procedures generally require live technical testimony, and that the current Board members will not have an opportunity to ask questions of all of the witnesses who testified late last year in EIB 08-19. Neither of these facts precludes the Board from taking administrative notice of the entire record in EIB 08-19, such that all parts of the record are admitted into evidence to the same extent as evidence offered in EIB 11-16.
- e. I reviewed all case law cited by Petitioners, along with the cited Rules of Evidence and the sections cited from the Administrative Law Treatise by Pierce. I also considered several cases in the Tenth Circuit relating to applications for asylum, and several recent utilities cases in New Mexico, including *TW Telecom of New Mexico v. New Mexico Public Regulation*

Commission and Qwest Corporation, 150 N.M. 12, 256 P.3d 24, 2011-NMSC-029 (2011). It is clear from these cases that evidence of which administrative notice is taken may establish the truth of the matter asserted, is substantial evidence, is sometimes technical, and may change the outcome of the case altogether.

- f. Parsing the record in EIB 08-19 for adjudicative facts versus legislative facts is not helpful in this discussion. Although the Board's Rulemaking Procedures are strongly adjudicatory, this Board is engaged in rulemaking, confronted with questions of law and policy for the whole state.
- g. In EIB 08-19 these same Petitioners had an opportunity to cross-examine the live witnesses offered by NEE, and to rebut their testimony. In EIB 11-16, Petitioners will have the opportunity to cross-examine a few of the witness from 08-19 and still have the opportunity to present rebuttal on all of the issues of fact they may dispute from that proceeding.
- h. Before the Board members decided on November 15 that they wished to "weigh" the testimony offered in EIB 08-19 as part of their deliberations in this matter, the Hearing Officer might have agreed with the Petitioners' statements in the Response on the limited purpose of the documents accepted into the record, and on the hearsay and witness competence considerations. The Board having reflected further, and deciding to weigh all evidence offered in EIB 08-19, the Hearing Officer will not impose limitations on the status of that evidence.

- i. It is unnecessary and would be repetitious for Ms. Nanasi to “sponsor” prior testimony from EIB 08-19.
- j. As Petitioners note, it is unnecessary for the Board to take administrative notice of Dr. Gutzler’s testimony in EIB 10-04; Dr. Gutzler is testifying in EIB 11-16 in person and can adopt and incorporate his previous testimony.
- k. Petitioners do not object to the Board taking administrative notice of Dr. Overpeck’s testimony from EIB 10-04, and it will be included in this record, along with his exhibits.
- l. NEE has not established the relevance of the pleadings in New Mexico’s appellate courts for which it seeks to have the Board take administrative notice, and the request is denied.


FELICIA L. ORTH, Hearing Officer